Ernst & Young v Maxbiz Corp Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–987 OF 2007
GOPAL SRI RAM, HELILIAH AND AHMAD MAAROP JJCA
30 APRIL 2008

Civil Procedure — Striking out — Action — Whether plaintiff would succeed on pleaded case — Whether appellate court could examine documents and facts to decide whether plaintiff had cause of action — Whether would amount to usurpation of function of trial judge

Tort — Negligence — Duty of care — Three fold test — Whether it was fair, just and reasonable to impose duty of care — Whether meticulous examination of facts and circumstances called for

The plaintiff/respondent was jointly incorporated by two other companies, to take over the assets and liabilities and to inject capital into Geahin Engineering Bhd ('Geahin'), a public listed company, which had become financially strained. The defendant/appellant was the auditor of Geahin and the adviser of the restructuring scheme. The plaintiff's case in the court below was that during the course of the restructure, the defendant had rendered advice to it upon which it acted to its detriment. However, the defendant contended that its advice was accompanied with a caution which sufficiently excluded the defendant from liability to the plaintiff and therefore sought an order to strike out the plaintiff's claim under O 18 r 19 of the Rules of the High Court 1980. The application was dismissed by the High Court and hence this appeal.

Held, dismissing the appeal with costs:

(1) It is well settled that the existence of a duty of care in given circumstances is a mixed question of law and fact. The three fold test formulated in *Caparo Industries v Dickman* [1990] 2 AC 605 and adopted by the Federal Court in *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389 calls for a meticulous examination of the fact and circumstances of each case. In particular, the third limb of the test, that it must be just, fair and reasonable to impose a duty of care, requires careful consideration after mature

argument. This was thus not an exercise that is suitable or appropriate to be undertaken on a summons to strike (see para 5).

(2) The exercise of summary jurisdiction of the court by a minute and protracted examination of the documents and facts in order to see whether the plaintiff really had a cause of action would amount to usurpation of the position of the trial judge. So too in the present case, to trawl through the documents to make a pronouncement on the merits of the case would amount to usurpation of the function of the trial judge (see para 6); *Mooney & Ors v Peat, Marwick, Mitchell & Co* [1967] 1 MLJ 87 and *Wenlock v Moloney* [1965] 1 WLR 1238 referred.

[Bahasa Malaysia summary

Plaintif/responden ditubuhkan bersama oleh dua syarikat lain, untuk mengambil alih aset dan liabiliti dan untuk menyuntik dana ke dalam Geahin Engineering Bhd ('Geahin'), sebuah syarikat yang disenaraikan, yang mengalami masalah kewangan. Defendan/perayu adalah juruaudit Geahin dan penasihat skim penstrukturan semula. Kes plaintif di Mahkamah Tinggi adalah bahawa semasa penstrukturan semula, defendan telah memberikan nasihat kepadanya, akibat dari mana tindakan yang diambil merugikannya. Walau bagaimanapun, defendan menghujah bahawa nasihatnya disertai dengan amaran yang secukupnya untuk mengelakkan defendan daripada liabiliti kepada plaintif dan oleh itu memohon perintah untuk membatalkan tuntutan plaintif di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980. Permohonan tersebut telah ditolak oleh Mahkamah Tinggi dan maka rayuan ini.

Diputuskan, menolak rayuan dengan kos:

(1) Ia adalah tetap bahawa kewujudan kewajipan berhati-hati dalam keadaan tertentu adalah persoalan undang-undang dan fakta yang bercampur-aduk. Ujian tiga peringkat yang dirumuskan di dalam kes *Caparo Industries v Dickman* [1990] 2 AC 605 dan diterima oleh Mahkamah Persekutuan di dalam kes *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389 menuntut pemeriksaan teliti fakta dan keadaan setiap kes. Khususnya bahagian ketiga ujian tersebut, bahawa ia mesti menjadi adil, saksama dan munasabah untuk mengenakan kewajipan berhati-hati, memerlukan pertimbangan yang teliti selepas penghujahan penuh. Oleh itu ini bukanlah satu pelaksanaan yang sesuai atau sewajarnya untuk dibuat atas saman untuk pembatalan (lihat perenggan 5)

(2) Pelaksanaan bidang kuasa terus oleh mahkamah melalui pemeriksaan dokumen-dokumen dan fakta secara terperinci dan berlarutan untuk

menentukan sama ada plaintif sememangnya mempunyai kausa tindakan akan membentuk pengambilalihan kedudukan hakim bicara. Sama di dalam kes ini, untuk meneliti dokumen-dokumen untuk membuat keputusan atas merit kes akan membentuk pengambilalihan fungsi hakim bicara (lihat perenggan 6); *Mooney & Ors v Peat, Marwick, Mitchell & Co* [1967] 1 MLJ 87 and *Wenlock v Moloney* [1965] 1 WLR 1238 dirujuk.]

Notes

For cases on action, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6655–6693.

For cases on duty of care, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 963–1011.

Cases referred to

Caparo Industries Plc v Dickman & Ors [1990] 2 AC 605, HL (refd)

Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors [2006] 2 MLJ 389, FC (refd)

Mooney & Ors v Peat, Marwick, Mitchell & Co [1967] 1 MLJ 87, HC (refd)

Wenlock v Moloney & Ors [1965] 1 WLR 1238, CA (refd)

Legislation referred to

Rules of the Court of Appeal 1994

Rules of the High Court 1980 O 18 r 19

Appeal from: Civil Suit No S1–22–940 of 2006 (High Court, Kuala Lumpur).

Kelvin Seet (Wong Mun Hoe with him) (Cheang & Ariff) for the appellant.
ST Geetha (William Leong & Co) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This is the judgment of the court

[2] This appeal is directed against the order of the High Court at Kuala Lumpur dismissing the application of the defendant ('appellant') made under Rules of the High Court 1980 ('RHC') O 18 r 19 strike out the claim of the plaintiff ('respondent'). The brief factual background against which this appeal rests is as follows.

[3] Geahin Engineering Bhd, which we will call the target company, is a public company limited by shares. Its shares are freely traded on the Stock

Exchange at Kuala Lumpur. It became financially straitened. The stock exchange was concerned. It acted under Practice Note 4 of its listing requirements and told the target company to put its financial affairs in order or face de-listing. Later a scheme was formulated to financially rescue the target company. The defendant was the auditor of the target company. It also acted as the target company's adviser in the restructuring scheme. What the scheme amounted to is this. Two companies, Mayford Garments Sdn Bhd or Mayford, and another company called MKK Industries Sdn Bhd or MKK were to jointly incorporate a third company which was then to take over the assets and liabilities of the target company and inject capital into it. A company was then incorporated. It is the plaintiff. The plaintiff's case in the court below is that during the course of the restructure the defendant rendered advice to it upon which it acted to its detriment. The defendant's answer is that it did give the advice but that advice was accompanied with a caution which sufficiently excluded the defendant from liability to the plaintiff.

[4] In addressing us on the appeal learned counsel for the defendant took us through his client's advice and other relevant documents at some length to demonstrate that the plaintiff would not succeed on its pleaded case. As such, so the argument goes, the pleading must be struck out and the learned judge in the court below erred in not making an order in terms of the defendant's summons.

[5] With respect we are unable to agree. It is well settled that the existence of a duty of care in given circumstances is a mixed question of law and fact. The three fold test formulated by the House of Lords in *Caparo Industries Plc v Dickman & Ors* [1990] 2 AC 605 and adopted by our Federal Court in *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389 calls for a meticulous examination of the fact and circumstances of each case. In particular, the third limb of the test that it must be just, fair and reasonable to impose a duty of care requires careful consideration after mature argument. This is not an exercise that is suitable or appropriate to be undertaken on a summons to strike.

[6] In a case as a present we can do no better than to quote from the judgment of Raja Azlan Shah J (as his Royal Highness then was) in *Mooney & Ors v Peat, Marwick, Mitchell & Co* [1967] 1 MLJ 87. There, the learned judge applied with approval the following passage in the judgment of Danckwerts LJ in *Wenlock v Moloney & Ors* [1965] 1 WLR 1238:

> But this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge.

[7] Here too, the plaintiff would have us trawl through the documents to make a pronouncement on the merits of this case. That in our view would indeed be a usurpation of the function of the trial judge. Therefore it comes on no surprise, having regards to the facts and circumstances now before us, that the High Court dismissed the defendant's application.

[8] Before we conclude we must say something about how this appeal came to be argued before us. On 21 April 2008, that is to say last Monday, this court was moved on a motion for an extension of time to file the appeal record against the order of the High Court. Having regard to the fact that this is an interlocutory appeal and any delay in its disposal may prejudice the speedy trial of the main action we directed the motion to be treated as an appeal proper. We also dispensed with compliance of the Rules of the Court of Appeal 1994. Further, we directed the defendant to make available to us by way of affidavit all the cause papers that were before the High Court. That was done and we then directed the appeal to be taken this morning.

[9] For the reasons already given, this appeal cannot succeed. It is dismissed. The appellant must pay the respondent the costs of this appeal. The deposit in court shall be paid out to the respondent to account of its taxed costs.

Appeal dismissed with costs.

Reported by M Sivabarathi